United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To be argued by
DAVID A. PRAVDA

74-2400

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

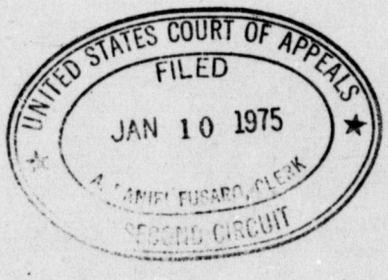
Appellee,

-against-

LARRY SESSION,

Defendant-Appellant.

APPELLANT'S BRIEF



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 74-2400

UNITED STATES OF AMERICA,

-against-

LARRY SESSION,

Defendant-Appellant.

APPELLANT LARRY SESSION'S BRIEF

INTRODUCTORY STATEMENT

The defendant-appellant, LARRY SESSION appeals from a judgment of the United States District Court for the Southern District of New York, rendered on October 22, 1974, convicting appellant, after a trial before District Judge Edward Weinfeld and a jury, of one count of conspiracy [18 U.S.C. §371]. SESSION was a Postal Service employee at the time of the offense and the conspiracy alleged was a conspiracy to embezzle mail [18 U.S.C. §1709].

The appellant was sentenced under the Federal Youth Corrections Act [18 U.S.C. §5010(b)] with all except three months of the sentence being suspended [18 U.S.C. §3651]. In addition, a two year period of probation was imposed to follow the sentence of imprisonment [18 U.S.C. §5010(a)].

QUESTIONS PRESENTED

1. Did the trial judge improperly limit the defense by refusing to permit the showing of a videotape of alleged co-conspirators at work on February 13, 1974 in the General Post Office?

2. Was the appellant denied a trial by a jury with no preconceived thoughts about the appellant because the trial judge detained the entire panel of prospective jurors while awaiting the late arrival of the appellant?

3. Did the trial judge commit error in refusing to instruct the jury that even if they believed that the appellant had embezzled the contents of a letter on February 12, 1974, that such an act could be considered an independant act and not part of a conspiracy?

It is urged that this Court answer each question in the affirmative.

THE FACTS OF THE CASE

The appellant, a Postal Service employee, worked in the Penn Terminal area of the Manhattan General Post Office in the New York State culling section. The appellant's duty was to cull, or separate, from the main stream of mail those pieces of mail which, by virtue of their size, shape, content or otherwise could not be fed to the sorting machines.

The government alleged that there existed a conspiracy among certain of the employees at the New York State culling section to embezzle the monetary contents of mail addressed to certain charitable organizations.

Postal investigators and Inspectors testified about surveillances they made from a hidden observation gallery from late January 1974 to February 16, 1974 when the appellant and his co-workers were all arrested. There was testimony by one witness of an alleged embezzlement by the appellant on February 12, 1974, although no substantive count of mail embezzlement was brought against the appellant. In addition there was testimony about the placing of approximately 150 "test letters" in the general work area and the observation of the appellant's giving what were believed to be "test letters" to co-workers, one of which alleged "test letters" was further alleged to have been subsequently opened by a co-worker. Also, pre-recorded serial numbered currency from

"test letters" were later found on the person of one of the co-conspirators, but the specific "test letters" from which the currency came could not be, and were not, connected to the appellant.

The government also had videotape film, taken from the hidden observation gallery, of the co-conspirators at work on February 13, 1974 and on the late night - early morning of February 15-16, 1974 including the arrest of the appellant and his co-workers.

The appellant did not deny, either in his own testimony or in a written statement given to the Postal Inspectors and introduced at the trial, that he had, in fact, given mail which be believed contained money to co-workers. However, the appellant did deny knowing that the co-workers were embezzling from the mail.

The essence of appellant's position was that he had no criminal intent and was not a member of the conspiracy of co-workers,

In explanation and justification of appellant's admitted giving of mail which he believed contained money to co-workers, the appellant described an unsupervised, unstructured, under-utilized work force that consistently engaged in fooling-around, horseplay and even dancing around the floor to make the Work time pass. In this atmosphere the appellant contended that it was common for the workers, as if to

flagrantly call attention to the cardinal prohibition of the job regarding theft, to throw mail which they could either see, feel or strongly believed contained money to one another, with the joking advice, "Go buy yourself a cup of coffee." The appellant contended that the giving of the mail to co-workers was no more than a standing joke as far as he was concerned and that he did not know that mail was being embezzled.

The appellant specifically controverted the one alleged instance of a direct embezzlement.

The appellant was not working on February 13, 1974 and he does not appear in the videotape taken that day, although his alleged co-conspirators do appear. The appellant is in the videotape of February 15-16, 1974.

ARGUMENT

POINT I

THE COURT BELOW IMPROPERLY LIMITED THE DEFENSE BY REFUSING TO PERMIT THE SHOWING OF A VIDEOTAPE OF THE ALLEGED CO-CONSPIRATORS AT WORK ON FEBRUARY 13, 1974.

The government had in its possession a videotape, taken by Postal Inspectors from their hidden observation gallery, which showed the activities of alleged co-conspirators while the alleged co-conspirators were working in the New York State

culling section on February 13, 1974. The appellant was concededly not present when that videotape was made (p. 32a)*. The appellant desired to play for the jury the videotape taken on February 13, 1974 (pp. 31a-34a). The trial court refused to permit the playing of the tape citing that it was "...not relevant evidence. It has no bearing on the issues..." (p. 33a).

It is respectfully submitted to this Court that the videotape was not only relevant, but of the essence to the defense; and that the appellant was denied a fundamentally fair trial in not being permitted to play the videotape.

The total running time for the videotape which was not allowed to be played and the videotape which was played was approximately one hour (p. 31a). Thus, the time which would have been required to play the disputed videotape was considerably less than one hour.

The indictment charges that a conspiracy existed from on or about January 1, 1973 to the date of the indictment (p. 5a); the trial judge, in his charge to the jury, further refined the crucial time period from the end of January to February 16, 1974 (p.64a). Both overt acts charged in the indictment (p. 6a) occurred on February 16, 1974. Thus, it can be seen that a videotape taken of the alleged coconspirators on February 13, 1974 was taken during the very heart of the time period when the alleged conspiracy was active.

*Page numbers in parenthesis followed by a lower case "a" refer to the page numbers of Appellant's Appendix.

In a case, as in the instant case, where the appellant concedes having handed the letters to the alleged co-conspirator, but only contests the issue of appellant's motivation and knowledge of what the alleged co-conspirator would do with the letter, the appellant should have been given wide latitude to introduce his supporting evidence. The entire defense case consisted of the relatively brief testimony of the appellant himself and the playing of the videotapes. It cannot be said that the subject videotape was simply cummulative evidence, as there was not that much evidence presented in toto.

The appellant testified about the extensive horseplay engaged in by the postal workers because of the lack of work to perform (pp. 36a-42a). A Postal Inspector, who acted as narrator of the videotape that was played described dancing in the work area by the appellant and one of his alleged co-conspirators (p. 44a). The dancing which appeared on the videotape which was played was one brief example of the loose atmosphere and horseplay that occurred in the work area. The other videotape would have contributed indisputable evidence to support the testimony of the appellant insofar as the appellant described the horseplay that dominated the work area.

The videotape which was not played also showed the lack of work performed by the postal employees. It was

important to the defense to have the jury understand the general ambiance of the work area in order for the jury to accept the appellant's testimony that what he did was done as a joke and not as part of a conspiracy to embezzle mail. The trial court's refusal to allow the videotape to be shown prevented the defense from adequently developing and supporting the defense contention that appellant's conduct was a part of the loose atmosphere that prevailed, but that the conduct was not criminal.

In addition, there was a further compelling reason for the appellant's urging that the videotape be played. On the videotape not played there were numerous instances of mail embezzlement by the alleged co-conspirators. These acts were seen more clearly and in greater number on the videotape not shown than on the videotape which was shown. It was important to the appellant for the jury to be able to see for itself, and to judge for itself, the furtive and surreptitious manner in which the embezzlements were accomplished, as juxtaposed to the open and notorious manner that the appellant gave the letters which he believed contained money to co-workers. The contrast in the manner in which the different persons acted while doing the acts shown on the videotape was essential to the appellant's defense that what he did was only done as a joke, and without knowledge of the ultimate purposes of the other workers.

The importance of the videotape cannot be over-estimated when one considers the oral testimony of one of the postal investigators who specifically described the appellant's actions as surreptitious (pp. 24a-26a); which actions later appeared on the videotape (in the judgment of this writer) as not being surreptitious at all and which surely would have been in stark contrast to the obviously secretive behavior of the alleged co-conspirators as portrayed on the videotape not shown. This same witness further testified that he could not state the demeanor or attitude of the appellant in certain actions (p. 26a). Playing the videotape permitted the jury to exercise its own judgment about what they observed.

Playing the videotape also permitted the jury to draw its own conclusions about whether or not the appellant could see the embezzlements that were taking place around him. The government witnesses were unable to testify definitively on this point (pp. 21a-22a; 27a-28a), but the videotape permitted the jury to drawn its own conclusions.

Playing both videotapes would have given the jury a more accurate view of the nature of the conspiracy and a better background against which to determine if the appellant was a member of the conspiracy.

It is axiomatic that the government could have introduced statements or actions of alleged co-conspirators, made outside the presence of the appellant, against the appellant [see e.g., United States v. Copeland, 295 F.2d 635 (1961)]; the appellant should have the converse right.

It is respectfully submitted that the refusal to permit the appellant to play the short videotape was a violation of appellant's rights to compel the production at trial of documentary evidence on his behalf [Federal Rules of Criminal Procedure Rules 17(c) and 26].

POINT II

THE TRIAL COURT SHOULD NOT HAVE PERMITTED THE ARRAY OF PROSPECTIVE JURORS TO LISTEN TO THE COLLOQUY ABOUT APPELLANT'S LATE ARRIVAL, AND SHOULD NOT HAVE REQUIRED THE ARRAY TO WAIT FOR APPELLANT'S ARRIVAL.

The appellant did not arrive at Court for some one and one-half hours after he should have arrived for the scheduled commencement of the trial. During this period of one and one-half hours, the array of potential jurors was seated in the courtroom and was well able to listen to the proceedings taking place in open court (pp. 11a-15a). Appellant's counsel requested that the array of prospective jurors be excused, but the trial court insisted on having the array wait for the arrival of the appellant.

It is conceded that there was no justification for the appellant's late arrival, but this does not waive his right to a trial by a jury having no preconceived thoughts or

notions about the appellant in any manner whatsoever. It is impossible to determine whether or not actual prejudice accured to the appellant as a result of this episode, but at so early a stage in the trial process, when it would have been so easy to secure a new, untainted, array of prospective jurors, it is respectfully submitted that the trial court should have done so.

The error is further compounded in that in the trial judge's opening remarks to the jury, the trial judge emphasized to the jury that the conduct of a witness should be observed with as much care as that given to the testimony itself. This admonition regarding conduct, coming so soon after the appellant's flagrant mis-conduct in late arriving, could only serve to emphasize the unfortunate incident.

POINT III

THE TRIAL JUDGE COMMITTED ERROR IN REFUSING TO INSTRUCT THE JURY THAT THE ALLEGED EMBEZZLEMENT BY THE APPELLANT ON FEBRUARY 12, 1974 COULD BE CONSIDERED AN INDEPENDENT ACT AND NOT PART OF A CONSPIRACY.

There was evidence from one government witness during the trial that the appellant had embezzled one letter by himself on February 12, 1974. The trial JUDGE explained to the jury in his charge that while the appellant was not

charged for the claimed act of embezzlement, the testimony could be accepted by them as evidence of the appellant's participation in a conspiracy (pp. 65a66a). There was also some testimony during the trial, which was adverted to by the trial judge in his charge (pp.58a-59a) to the effect that the appellant did not share in the financial proceeds of the conspirators' embezzlements.

The appellant requested (p. 74a) that the trial judge charge the jury that even if they believed that the appellant himself embezzled a letter on February 12, 1974, they could still conclude that such act was an independent act of embezzlement and was not part of a conspiracy. The trial judge declined to so instruct the jury.

It is respectfully submitted that the requested instruction was proper as the "single transaction" doctrine could warrant a finding by the jury that the single act of embezzlement was not a part of a conspiracy. United States v. Kane, 351 F.2d 600 (2d Cir., 1965). United States v. Carminati, 247 F.2d 640, 643 (2d Cir., 1957).

It is respectfully submitted that this view of the matter is especially compelling in the instant case wherein there was some testimony to the effect that the appellant did not share in the conspiracy's profits; therefore, the jury might well have

concluded, under proper instruction, that the embezzlement of February 12th was not proof of the conspiracy.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED, OR IN THE ALTERNATIVE, THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR A RETRIAL.

Respectfully submitted,

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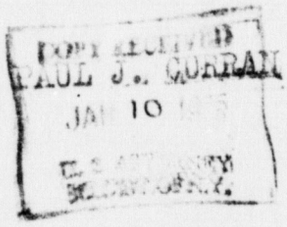
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